NO. 56637-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

O'NEAL PAYNE, III,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable John Fairgrieve, Judge

BRIEF OF APPELLANT

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A. INTRODUCTION

Just four days before trial, the trial court allowed appellant O'Neal Payne's appointed attorney to withdraw, despite there being no actual conflict of interest. The court then interpreted Mr. Payne's expression of frustration as a request to proceed pro se. At a hearing the next day to consider Mr. Payne's supposed request for self-representation, Mr. Payne appeared over Zoom in a different location than his newly appointed attorney. The court set no ground rules for how Mr. Payne could privately and continuously confer with his attorney during that hearing. Mr. Payne repeatedly explained he wanted to proceed to trial as scheduled, but also wanted the help of counsel. The court made no finding that Mr. Payne's request for self-representation was unequivocal, but nevertheless concluded he knowingly and voluntarily waived his right to counsel.

Predictably, Mr. Payne was convicted after representing himself at trial. The multiple errors in this process necessitate reversal of Mr. Payne's convictions.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing appointed counsel to withdraw on the eve of trial when no actual conflict existed.

2. The trial court violated Mr. Payne's constitutional right to confer privately and continuously with counsel at all critical stages of the proceedings.

3. The trial court violated Mr. Payne's constitutional right to counsel by allowing him to proceed pro se at trial, where he did not make an unequivocal request and did not make a knowing, intelligent, and voluntary waiver of his right to counsel.

4a. The trial court exceeded its statutory authority in entering a sexual assault protection order (SAPO) for a witness who was not the victim of a sex offense.

4b. The trial court exceeded its statutory authority in entering fixed 10-year expiration dates for both SAPOs.

5a. The trial court erroneously ordered Mr. Payne to complete a mental health evaluation and treatment as a condition of community custody.

5b. The trial court erroneously ordered Mr. Payne to pay discretionary community supervision fees in his felony judgment and sentence.

5c. The trial court erroneously ordered Mr. Payne to pay discretionary supervision fees and collection costs in his misdemeanor judgment and sentence.

Issues Pertaining to Assignments of Error

1. Must Mr. Payne's convictions be reversed, where the trial court erred in allowing Mr. Payne's appointed counsel to withdraw on the eve of trial where no actual conflict existed, prejudicing Mr. Payne by forcing him to choose between his right to counsel and his right to a speedy trial?

2. Must Mr. Payne's convictions be reversed, where he appeared by video in a different location than his attorney for a hearing at which the court considered and granted Mr. Payne's request for self-representation, violating Mr. Payne's constitutional right to confer with his attorney continuously and privately at all critical stages of the proceedings?

3. Must Mr. Payne's convictions be reversed, where the trial court erroneously allowed him to represent himself at trial, even though Mr. Payne never made an unequivocal request to proceed pro se and did not knowingly, intelligently, and voluntarily waive his right to counsel?

4a. Is remand necessary for the trial court to vacate the SAPO protecting B.A., where B.A. was not the victim of a sex offense, as defined by the relevant statute, and the court therefore exceeded its statutory authority in entering that SAPO?

4b. Is remand necessary for the trial court to strike the fixed 10-year expiration date from the SAPOs protecting both B.A. and B.K., where the relevant statute requires a SAPO to expire two years after Mr. Payne's actual release date, not the statutory maximum term?

5a. Is remand necessary for the trial court to strike the community custody condition ordering Mr. Payne to complete a mental health evaluation and treatment, where the court did not

find Mr. Payne suffers from a mental illness that likely influenced the offenses?

5b. Is remand necessary for the trial court to strike discretionary supervision fees from Mr. Payne's felony judgment and sentence, where the record indicates they were inadvertently imposed?

5c. Is remand likewise necessary for the trial court to strike discretionary supervision fees and collection costs from Mr. Payne's misdemeanor judgment and sentence?

C. STATEMENT OF THE CASE

The prosecution charged O'Neal Payne on March 16, 2021 with one count of commercial sex abuse of a minor and one count of fourth degree assault with sexual motivation. CP 5, 32. The prosecution alleged Mr. Payne got into a vehicle with 17-year-old B.K. and 18-year-old B.A., uninvited, and offered the girls money in exchange for sex. CP 4. The prosecution further alleged Mr. Payne caressed B.A.'s cheek as he exited the vehicle. CP 4.

Throughout the pretrial process, Mr. Payne asserted his right to a speedy trial, objecting to continuances requested by the prosecution and his attorneys. 1RP 19, 35, 48, 59, 66-67, 74.[1] But, due to several factors, including a competency evaluation, trial preparation, and withdrawal of Mr. Payne's first appointed counsel, Mr. Payne's trial was continued for several months. 1RP 18-19, 31, 43-44, 57, 65, 70.

Mr. Payne's second attorney, Louis Byrd, was appointed on June 24, 2021. Supp. CP__ (Sub. No. 49, Order Appointing Counsel). In late October of 2021, Mr. Byrd requested a trial continuance due to an outbreak of COVID-19 at the jail, where Mr. Payne was incarcerated pending trial. 1RP 76-77, 84-88. Apparently six inmates in a different pod than Mr. Payne tested positive and were immediately isolated. 1RP 96. Mr. Byrd stated he was not willing to proceed to trial unless Mr. Payne was vaccinated. 1RP 93, 99. Mr. Payne confirmed he was not

[1] This brief refers to the verbatim report of proceedings as follows: **1RP** – numerous dates; **2RP** – December 10, 13, 14, 2021, January 20, 2022.

vaccinated. 1RP 101. Mr. Byrd explained he "was always going to raise this issue as far as trial." 1RP 89.

The trial court wondered, "So, how does that connect with your client's constitutional right to be going to trial in a speedy-trial period[?]" 1RP 91. Mr. Byrd indicated he might be willing to proceed if the jail tested Mr. Payne for COVID-19 daily during trial. 1RP 100, 105. Mr. Payne objected to any continuance, stating he was ready to go to trial: "I have been ready since the day I got here." 1RP 101.

Ultimately, the prosecution needed continuances due to witness unavailability, so the trial court reset Mr. Payne's trial date to December 13, 2022, with speedy trial expiring the same day. 1RP 110-11, 121; Supp. CP__ (Sub. No. 103, Scheduling Order). Mr. Payne again objected. 1RP 115, 121.

On December 6, 2021, Mr. Byrd filed a written motion to withdraw as counsel. Supp. CP__ (Sub. No. 112, Affidavit of Counsel Motion to Withdraw, 1-2). Mr. Byrd averred he was "not willing to risk his health or life by trying a case in which

Counsel is required to sit next to an unvaccinated client for 8 hours a day while trying the case." Supp. CP__ (Sub. No. 112, at 1-2). Mr. Byrd stated he would forgo withdrawal if Mr. Payne tested negative for COVID-19 prior to and during trial. Supp. CP__ (Sub. No. 112, at 1-2).

The trial court held a hearing on December 9, just four days before trial, to consider counsel's motion to withdraw. 1RP 126-27. The court explained the jail was unable to perform rapid tests for inmates during trial. 1RP 27. Mr. Byrd reiterated his request to withdraw. 1RP 128. The court granted the request, finding counsel had "a conflict between your personal interest, your health in this particular matter, and the defendant's interest in terms of being represented." 1RP 128.

Mr. Payne expressed confusion about what was happening, explaining he "didn't necessarily get it" and "[i]t sounded like a mixup." 1RP 128. He indicated, however, "if he is withdrawing, I'm going to stick to my gun, and I'm ready to go Monday. No ands, ifs, or buts about it, with or without

him." 1RP 128. The court clarified whether Mr. Payne just said, "you want to go to trial on Monday, with or without Mr. Byrd." 1RP 129. Mr. Payne responded, "Yeah. I would prefer it to be with him. But if he doesn't want to present my case on my behalf, then it's basically out of my -- I was sitting in jail (outside interference) who knows how long, for no reason. Because I have been ready to go since day one." 1RP 129.

The court explained it would need to hear any request for self-representation the following day. 1RP 129. The court appointed substitute counsel for Mr. Payne and set the matter over for the next morning. 1RP 129-30. Mr. Payne tried to talk to Mr. Byrd, noting he had not been exposed to COVID-19 and would wear a mask during trial if needed. 1RP 131. When Mr. Byrd told Mr. Payne that he no longer represented him, Mr. Payne responded, "I'll call you later and then we'll discuss it." 1RP 133. Mr. Payne reiterated, "You are my attorney. So are you ready to proceed or not?" 1RP 133.

The parties reconvened the next day, Friday, December 10. 2RP 9. Megan Peyton appeared as Mr. Payne's newly appointed counsel. 2RP 3, 9. The hearing was conducted by Zoom web conference, with Ms. Peyton and Mr. Payne appearing from different locations. Supp. CP__ (Sub. No. 116, Minute Entry); Parties' Stipulation to Record on Appeal. Ms. Peyton indicated she had received the appointment late the previous day and had not yet spoken to Mr. Payne. 2RP 9. At 9:06 a.m., the trial court allowed Ms. Peyton and Mr. Payne to talk privately in a Zoom breakout room. 2RP 9-10; Parties' Stipulation to Record on Appeal. The hearing reconvened at 9:16 a.m. Supp. CP__ (Sub. No. 116, Minute Entry); Parties' Stipulation to Record on Appeal.

Ms. Peyton explained Mr. Payne's "main concern is getting this trial done, so he wants to go on Monday." 2RP 10. She noted Mr. Payne was "more interested" in standby counsel. 2RP 10. The trial court then inquired of Mr. Payne how he wanted to proceed. 2RP 11. Mr. Payne responded that he

wanted counsel to help him collect evidence. 2RP 11. The court explained Ms. Peyton would need a trial continuance, to which Mr. Payne responded, "Well, I will -- if that's the case, I -- like I said, I will love her forward to, you know, help me in this case," but reiterated, "I'm ready to go on Monday." 2RP 12-13. Mr. Payne also stated he would "refuse" a continuance and was "not going to stand for that." 2RP 14-15.

Despite no written or oral motion made by Mr. Payne to represent himself, the trial court proceeded to conduct a colloquy with Mr. Payne about waiving his right to counsel. 2RP 15-25. Mr. Payne indicated he had not studied law or previously represented himself. 2RP 16. When informed of the charges and maximum penalty for each charge, Mr. Payne responded, "It doesn't matter." 2RP 16-17. The trial court asked Mr. Payne why he wanted to represent himself, to which Mr. Payne answered, "Your Honor, the only reason I don't want an attorney -- well, I – I'm not saying that I don't want an attorney. The thing is, that I've been here for nine months. I

never – I've never waived by 60-day speedy trial rights." 2RP 21. Mr. Payne proceeded to detail the conflict with his first attorney as well as the sudden withdrawal of his second attorney. 2RP 21-22. At the end of the colloquy, Mr. Payne stated for the first time, "I would like to present my case myself," but then reiterated his frustration with Mr. Byrd's last-minute withdrawal. 2RP 24-25.

The trial court did not make a finding as to whether Mr. Payne made an unequivocal request to proceed pro se. 2RP 15-25. But the court found Mr. Payne's waiver of counsel to be knowing and voluntary, and permitted Mr. Payne to represent himself at trial. 2RP 25-26. The court thereafter explained it was likely too late to obtain the evidence Mr. Payne wanted to present at trial. 2RP 27-29.

Trial began as scheduled on Monday, December 13, 2021. 2RP 40. Mr. Payne expressed his worries that his lawyer resigned "within a day or two notice," leaving him "to present all this evidence myself and then standing before the jury."

2RP 66. Mr. Payne reiterated he wanted evidence from his Facebook account, as well as video footage from his booking into jail, to undercut the prosecution's case. 2RP 55, 69, 76-78. The court again explained it was too late for Mr. Payne to gather evidence if he wanted to proceed to trial that day. 2RP 76, 80-81, 83-84.

B.K. and B.A. both testified at trial that, on March 11, 2021, they were sitting in B.K.'s car at the Vancouver Mall when Mr. Payne approached them and got in the backseat, uninvited. 2RP 229-30, 236-37, 253-254. B.K. was 17 years old and B.A. was 18 years old at the time. 2RP 229, 252. Both girls claimed Mr. Payne showed them a wad of cash and asked if they wanted to come back to his hotel room to have sex. 2RP 237-38, 257-58. They testified they repeatedly told Mr. Payne no. 2RP 238, 242, 256. Both girls claimed Mr. Payne caressed B.A.'s cheek as he got out of the car, telling her, "You know where to find me." 2RP 243, 256. Mr. Payne did not cross-examine either B.K. or B.A. 2RP 250, 265.

Officer Trent Harris testified he responded to a 911 call at the Vancouver Mall, where he spoke with both girls. 2RP 274-75. He assisted in arresting Mr. Payne at the nearby Days Inn, where Mr. Payne was found with a large amount of cash. 2RP 276, 280, 283. Mr. Payne briefly cross-examined Officer Harris, eliciting testimony that the girls never said Mr. Payne told them his hotel room number. 2RP 287-92.

After the prosecution rested, Mr. Payne indicated he thought B.K. and B.A. "would come back to the stand and would be questioned again by [the prosecutor] and I." 2RP 296. The court explained the prosecution would not be calling any more witnesses and the girls were no longer under subpoena, "so they're not available to you." 2RP 296. Mr. Payne responded, "we could just move forward," explaining he had no other evidence to present. 2RP 294, 296.

Mr. Payne gave only a brief closing argument, stating, "hopefully, I presented enough evidence to prove my

innocence." 2RP 335. Ultimately, he concluded, "I guess we'll just get on with it and let the rest handle itself." 2RP 335.

The jury found Mr. Payne guilty as charged. CP 57-59.

Following the jury verdicts, Mr. Payne stated he needed to file a motion for a mistrial. 2RP 364-65. He explained he thought he would have a chance to question the alleged victims again, but also that he did not want to "shameface" them. 2RP 365. Mr. Payne lamented he "might not even get the opportunity to even present" his evidence, "because "I'm in a situation to where both of my lawyers waited until the last minute. They pushed me out and they excluded evidence from me." 2RP 368. He continued, "and then I have to stand here and fend for myself with limited information and evidence and knowledge of the law." 2RP 369.

At sentencing, Mr. Payne moved for a new trial, reiterating he was forced to represent himself because his attorney quit just days before trial. 2RP 382, 396. The trial court denied the motion, finding it untimely under CrR 7.5.

2RP 283. The court sentenced Mr. Payne to the high end of the standard range on the commercial sex abuse of a minor conviction—34 months in prison, along with 36 months on community custody. 2RP 407; CP 78, 80-81.

Mr. Payne timely appeals. CP 61.

D. ARGUMENT

1. **The trial court erred in allowing Mr. Payne's appointed counsel to withdraw on the eve of trial where no actual conflict existed, forcing Mr. Payne to choose between his right to counsel and his right to a speedy trial.**

The trial court erred in finding Mr. Payne's appointed counsel had an actual conflict of interest because of counsel's desire not to proceed to trial with an unvaccinated client. This is not the type of personal conflict of interest contemplated by the RPCs. The trial court's error in granting counsel's request to withdraw on the eve of trial forced Mr. Payne to the constitutional choice of waiving his right to counsel or waiving his right to a speedy trial. Because a remedy must follow, this Court should reverse Mr. Payne's convictions.

The trial court has an affirmative duty to determine whether an actual conflict exists before the court may grant a motion to withdraw and substitute appointed counsel. State v. Vicuna, 119 Wn. App. 26, 30, 79 P.3d 1 (2003); State v. Ramos, 83 Wn. App. 622, 632, 922 P.2d 193 (1996). "The determination of whether an attorney's continued representation violates the Rules of Professional Conduct is a question of law and is reviewed de novo." State v. Hunsaker, 74 Wn. App. 38, 42, 873 P.2d 540 (1994).

A conflict of interest does not exist just because counsel says there is a conflict. See Ramos, 83 Wn. App. at 632. In Ramos, for instance, the prosecution contended the trial court erred in finding an actual conflict existed and allowing counsel to withdraw. Id. at 628. The court of appeals agreed, interpretating RPC 1.9. Id. at 629-33. The Ramos court reasoned, in alleging a conflict, defense counsel did not present any evidence that cross-examination of a state's witness would involve inquiry into confidential information gained by counsel in previously

representing the witness. Id. at 632. The record therefore failed to support Ramos's claim that an actual conflict existed, and the trial court erred in allowing counsel's withdrawal. Id. at 632-33.

The same was true in Vicuna. There, defense counsel alleged a conflict, stating only, "It concerns the ability to be able to call witnesses who Mr. Vicuna may need to be able to present his defense at the trial and the ability to do that." 119 Wn. App. at 30. The trial court granted counsel's motion to withdraw without any further inquiry. Id. The court of appeals found this to be error because the record was insufficient for the trial court to determine that an actual conflict existed. Id. at 32-33. Namely, "[t]here was no indication whether the conflict arose from a prior or current representation or whether the other client's representation was connected to the facts or issues of defendant's case." Id. at 32.

Here, as in Ramos and Vicuna, the trial court erred in finding an actual conflict and allowing Mr. Payne's counsel to withdraw. Counsel alleged only, "Counsel is not willing to risk

his health or life by trying a case in which Counsel is required to sit next to an unvaccinated client for 8 hours a day while trying the case." Supp. CP__ (Sub. No. 112, at 1). Counsel did not state any particular risk or vulnerability to COVID-19. Supp. CP__ (Sub. No. 112, at 1). The trial court made no further inquiry, ruling only, "I find you have a conflict between your personal interest, your health in this particular matter, and the defendant's interest in terms of being represented." 1RP 128.

RPC 6.2(c) allows for an attorney to refuse an appointment if "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." This rule might allow for an attorney to refuse appointment of an unvaccinated client. But Mr. Payne's counsel accepted appointment on June 24, 2021, and continued representing Mr. Payne throughout the summer and fall. Supp. CP__ (Sub. No. 49, Order Appointing Counsel). Thereafter, any withdrawal by counsel based on a conflict in "personal interest" was controlled by RPC 1.7(a)(2).

RPC 1.7(a)(2) provides that a "concurrent conflict of interest" exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person *or by a personal interest of the lawyer*." (Emphasis added.) Comment 10 clarifies the kinds of personal interest conflicts that allow for withdrawal under RPC 1.7(a)(2). For instance, "if the probity of a lawyer's own conduct in a transaction is in serious question"; "when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client"; or a lawyer's related financial or business interests may affect representation. RPC 1.7(a)(2) cmt. 10. Comment 10 further references RPC 1.8 for "specific Rules pertaining to a number of personal interests conflicts." Id.

Courts have not interpreted RPC 1.7(a)(2) broadly to encompass any claimed conflict of "personal interest." Rather, Washington courts recognize RPC 1.7(a)(2) "denotes a financial or familial interest or an interest arising from the lawyer's

exposure to culpability." In re Marriage of Wixom & Wixom, 182 Wn. App. 881, 898, 332 P.3d 1063 (2014). This makes sense, considering comment 10's reference to RPC 1.8, which enumerates several conflicts, none of which include the attorney's general discomfort proceeding to trial with a particular client. See In re Pers. Restraint of Stenson, 142 Wn.2d 710, 722, 16 P.3d 1 (2001). Indeed, the Stenson court recognized "[c]ase law does not support the application of the concept of a conflict of interest to conflicts between an attorney and client over trial strategy." Id.; see also State v. Stenson, 132 Wn.2d 668, 734, 940 P.2d 1239 (1997) ("The general loss of confidence or trust alone is not sufficient to substitute new counsel.").

An attorney's speculative concern about being exposed to a virus does not fall within a personal conflict of interest contemplated by RPC 1.7(a)(2). There was no evidence Mr. Payne had been exposed to COVID-19; he had not been in contact with any of the inmates who had recently tested positive. 1RP 131. The court did not inquire whether counsel was at

particular risk from COVID-19. Nor did the court consider whether the risk of exposure could be mitigated. For instance, Mr. Payne offered to wear a mask during trial, 1RP 131, and masks were required in the courtroom except for individuals "actively talking," 2RP 40. The court could have ordered the jail to isolate Mr. Payne before trial. Defense counsel and Mr. Payne also could have socially distanced during trial, so long as the court set ground rules to ensure they could confidentially communicate throughout trial. State v. Anderson, 19 Wn. App. 2d 556, 565, 497 P.3d 880 (2021) (recognizing courts can provide attorneys and clients "with access to additional communication technologies (such as text messaging devices) if necessary to maintain physical distancing"), review denied, 199 Wn.2d 1004 (2022).

While vaccination has certainly been a divisive political issue, vaccinated and unvaccinated defendants are equally entitled to representation. Courts have numerous tools to mitigate the risk to defense attorneys. Allowing withdrawal on

the eve of trial, however, is not one of those tools. RPC 1.7(a)(2) does not permit an appointed attorney to withdraw based on any claimed conflict. The trial court erred in concluding an actual conflict existed before inquiring further and before evaluating alternatives to withdrawal.

Washington courts have not resolved what prejudice standard applies when a trial court erroneously allows appointed counsel to withdraw. The Ramos court was not faced with this question because the remedy there was remand to reinstate the charges, which had been dismissed due to the trial court's erroneous finding of governmental mismanagement. 83 Wn. App. at 636. In Vicuna, the court held dismissal was not required because withdrawing counsel requested a continuance and so there was no speedy trial violation. 119 Wn. App. at 33-34.

To be sure, dismissal is an extraordinary remedy under the circumstances. But Vicuna should not be read broadly for the proposition that there is no remedy at all when the trial court erroneously allows appointed counsel to withdraw on the eve of

trial. Such a rule would obviate the trial court's affirmative duty to determine whether an actual conflict exists and allow for capricious withdrawals of counsel.

A workable rule is to adopt the prejudice standard from CrR 8.3(b), though requiring reversal rather than dismissal. CrR 8.3(b) recognizes that sometimes defendants are harmed by government mismanagement. "'Fairness to the defendant underlies the purpose of CrR 8.3(b).'" City of Kent v. Sandhu, 159 Wn. App. 836, 247 P.3d 454 (2011) (quoting State v. Koerber, 85 Wn. App. 1, 5, 931 P.2d 904 (1996)). CrR 8.3(b) requires a remedy when "there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial." This standard is met when the defendant is put to the constitutional choice of "going to trial unprepared, or waiving his right to a speedy trial and asking for a continuance." State v. Michielli, 132 Wn.2d 229, 244, 937 P.2d 587 (1997).

The same prejudice standard should apply here. That is, did the trial court's error in allowing counsel to withdraw put the

accused to the constitutional choice of waiving his right to counsel or waiving his right to a speedy trial? The trial court's error forced Mr. Payne to make this very choice. Counsel was allowed to withdraw on Thursday, December 9, with Mr. Payne's trial set for Monday, December 13, and speedy trial expiring that same day. 1RP 128; Supp. CP__ (Sub. No. 103, Scheduling Order). No substitute counsel could be prepared for trial by Monday. 2RP 11-12. Consequently, Mr. Payne waived his right to counsel so he could exercise his right to a speedy trial.[2] 2RP 24-26. He would not have had to make this choice but for the court's error in allowing his counsel to withdraw at the last minute. A remedy should follow. This Court should reverse Mr. Payne's convictions and remand for a new trial.

[2] Mr. Payne does not concede his waiver was valid. See infra argument 3.

2. **Mr. Payne appeared by video, in a different location than his attorney, at a hearing where the court determined Mr. Payne waived his right to counsel, violating Mr. Payne's constitutional right to privately confer with his attorney and requiring reversal.**

Mr. Payne appeared by video, physically separated from and in a different location than his attorney, at a hearing where the trial court considered and granted Mr. Payne's request to waive his right to counsel and represent himself at trial. Although the court allowed defense counsel to speak with Mr. Payne privately at the beginning of the hearing, the court never laid any ground rules for how Mr. Payne could confidentially confer with his attorney during the hearing. Nor was there any indication that he was allowed to do so. Given the physical separation, nonverbal communication was impossible. Mr. Payne was therefore denied his constitutional right to consult with his attorney, privately and continuously, at all critical stages of the litigation, necessitating reversal of his convictions.

Our federal and state constitutions guarantee criminal defendants the right to assistance of counsel at all critical stages of the litigation. U.S. CONST. amend. VI; CONST. art. 1, § 22; State v. Heddrick, 166 Wn.2d 898, 909, 215 P.3d 201 (2009). "A critical stage is one 'in which a defendant's rights may be lost, defenses waived, privileges claimed or waived, or in which the outcome of the case is otherwise substantially affected.'" Heddrick, 166 Wn.2d at 910 (quoting State v. Agtuca, 12 Wn. App. 402, 404, 529 P.2d 1159 (1974)).

"The constitutional right to counsel demands more than just access to a warm body with a bar card." Anderson, 19 Wn. App. 2d at 562. Among other things, it requires the "opportunity for private and continual discussions between defendant and his attorney." State v. Hartzog, 96 Wn.2d 383, 402, 635 P.2d 694 (1981). "The ability for attorneys and clients to consult privately need not be seamless, but it must be meaningful." Anderson, 19 Wn. App. 2d at 562. Given the importance of the right to confer,

courts must "closely monitor" any limitation on it. State v. Ulestad, 127 Wn. App. 209, 214, 111 P.3d 276 (2005).

Division Three recently held the denial of this right to be manifest constitutional error, reviewable for the first time on appeal under RAP 2.5(a)(3). Anderson, 19 Wn. App. 2d at 563. On his direct appeal, Anderson won resentencing on three limited matters—a vague community custody condition, two scrivener's errors, and erroneous imposition of legal financial obligations (LFOs). Id. at 559. Anderson attended his resentencing hearing by video, while his attorney appeared telephonically. Id. During the hearing, there was no discussion of whether Anderson consented to appear by video. Id. Nor was there any clarification whether Anderson and his attorney were able to communicate throughout the hearing. Id.

The Anderson court distinguished these facts from State v. Gonzales-Morales, 138 Wn.2d 374, 979 P.2d 826 (1999). There, Gonzales-Morales required a Spanish interpreter to communicate with counsel and understand the proceedings. Id. at 376. During

trial, the prosecution called a Spanish-speaking witness, but was unable to secure its own interpreter. Id. at 376-77. The court allowed the prosecution to "borrow" Gonzales-Morales's interpreter, subject to certain ground rules. Id. at 377. The court ordered the interpreter to remain at the defense table during the testimony. Id. at 387. The court also specified Gonzales-Morales could interrupt the testimony so he could communicate with his counsel as needed through the interpreter. Id. Additionally, the witness gave only brief testimony, in Spanish, which Gonzales-Morales could understand as a Spanish speaker. Id. Given all these factors, the Washington Supreme Court found no constitutional violation. Id. at 386.

By contrast, the Anderson court held the procedure used at Anderson's resentencing violated his constitutional right to privately confer with his attorney. 19 Wn. App. 2d at 563. Unlike Gonzales-Morales, the resentencing court "never set any ground rules for how Mr. Anderson and his attorney could confidentially communicate during the hearing." Id. "Nor

were Mr. Anderson and his attorney physically located in the same room, where they might have been able to at least engage in nonverbal communication." Id. Indeed, given that they appeared from different locations, it was "not apparent how private attorney-client communication could have taken place during the remote hearing." Id. The court of appeals found it "unrealistic to expect Mr. Anderson to assume he had permission to interrupt the judge and court proceedings if he wished to speak with his attorney." Id. The combination of these factors worked to deprive Anderson of his right to counsel. Id.

Division Three's decision in Anderson is consistent with CrR 3.4(e), which allows preliminary appearances, arraignments, bail hearings, and trial settings to be conducted by video conference. Other hearings may be conducted by video conference "only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule." CrR 3.4(e)(2). Critically,

CrR 3.4(e)(3) specifies "[v]ideo conference facilities must provide for confidential communications between attorney and client."

Due to health concerns presented by COVID-19, the Washington Supreme Court temporarily altered some court rules, such as speedy trial provisions. Fourth Revised & Extended Order Regarding Court Operations, No. 25700-B-646 (Oct. 13, 2020). But the court did not alter or suspend CrR 3.4(e). See id. While the order directs trial courts to "allow telephonic or video appearances" in criminal cases when "appropriate," it further mandates "courts shall provide a means for defendants . . . to have the opportunity for private and continual discussion with their attorney" at all critical stages. Id. at 10-11 § 16. The Anderson court recognized this order reflects "the role of the judge to make sure that attorneys and clients have the opportunity to engage in private consultation." 19 Wn. App. 2d at 562.

This Court has not yet considered facts analogous to Anderson. But this Court recently cited Anderson with approval

in an unpublished case, In re Personal Restraint of Reed, No. 53037-6-II, 2022 WL 4482748, at *4 (Sept. 27, 2022). In Reed, the victim's mother, who attended trial, used a hearing device as an accommodation for a disability, which picked up even whispered conversations in the courtroom. Id. at *1. Unlike Anderson, the court set grounds rules for how Reed could communicate with his attorney, explaining they could alert the court of the need to speak and the court would allow a break. Id. Reed also remained seated next to counsel, so he could indicate when he wanted to pause the proceedings without interrupting the court. Id. Additionally, their physical proximity allowed them to engage in nonverbal communication. Id. This Court therefore found no violation of Reed's right to confer. Id.

This case involves the very same procedure condemned in Anderson. There can be no real dispute that a hearing at which the court considers and grants the accused's request for self-representation is a critical stage where the right to counsel attaches. Such a hearing necessarily involves waiver of the

constitutional right to counsel. And, certainly, the waiver of counsel can substantially affect the outcome of the case. State v. Madsen, 168 Wn.2d 496, 503, 229 P.3d 714 (2010) (recognizing "potentially detrimental impact on both the defendant and the administration of justice").

Mr. Payne appeared by video, in a different location and physically separated from his attorney, at this critical stage. 2RP 9; Parties' Stipulation to Appellate Record; Supp. CP__ (Sub. No. 116, Minute Entry). Like Anderson and unlike Reed, the trial court never put on the record whether private communication between Mr. Payne and his attorney was possible during the hearing. See 2RP 9-35. Nor did the court once specify any ground rules for how Mr. Payne could confidentially communicate with his attorney during the hearing. See 2RP 9-35. Nonverbal communication was also impossible because Mr. Payne and his attorney were in different locations. As in Anderson, it is not apparent how private attorney-client communication could have even taken place during the hearing.

The prosecution may emphasize Mr. Payne and his attorney, Ms. Peyton, were afforded the opportunity to privately consult at the beginning of the hearing in a Zoom breakout room. 2RP 9-10; Parties' Stipulation to Appellate Record. Ms. Peyton explained that, due to the late appointment, she had not yet spoken to Mr. Payne. 2RP 9. At her request, the court recessed to allow them to talk privately in a breakout room. 2RP 9-10. Ms. Peyton and Mr. Payne spoke for 10 minutes, from 9:06 to 9:16 a.m., before returning to the virtual hearing. Parties' Stipulation to Appellate Record; Supp. CP__ (Sub. No. 116, Minute Entry).

These facts do not distinguish Mr. Payne's case from Anderson. Division Three acknowledged Anderson and his attorney were able to confer prior to resentencing. 19 Wn. App. 2d at 564. This did not change the court's conclusion that Anderson was denied his constitutional right to confer with counsel *during* the hearing. See id. at 563-64. As the Washington Supreme Court has recognized, "[c]onsultation

includes not only assistance in trial preparation, *but opportunity for private and continual discussions between defendant and his attorney during the trial*" and all critical stages. Hartzog, 96 Wn.2d at 402 (emphasis added). Mr. Payne was not afforded any such opportunity.

Mr. Payne's pretrial hearings routinely occurred over Zoom. The trial court periodically allowed defense counsel and Mr. Payne to talk privately in a breakout room, always when counsel had not met Mr. Payne yet or had not spoken to him about the issue at hand. 1RP 5-6 (preliminary appearance), 21-22 (competency review hearing), 54 (appointment of new counsel); 2RP 37-39 (appointment of standby counsel). These requests were always made by defense counsel, never by Mr. Payne. 1RP 5-6, 21-22, 54; 2RP 37.

At no hearing was Mr. Payne advised of his ability to request private conference with his attorney in a breakout room. Indeed, it is not clear whether that option was even available at Mr. Payne's request, as opposed to his attorney's request. Just as

in Anderson, it would be unrealistic to expect Mr. Payne "to assume he had permission to interrupt the judge and court proceedings if he wished to speak with his attorney." Anderson, 19 Wn. App. 2d at 563.

In summary, the option for a breakout room was never communicated to Mr. Payne as a means to "private[ly] and continual[ly]" consult with his attorney during any pretrial hearing, including the critical hearing where he waived his right to counsel. Hartzog, 96 Wn.2d at 402. This Court should apply the well-reasoned rule of Anderson and hold Mr. Payne's appearance by video at a critical stage of the proceedings, without a specified means to privately consult with his attorney, violated his constitutional right to counsel.

When a defendant is deprived of the right to counsel at a critical stage, automatic reversal is required "when the violation pervades and contaminates the entire case." State v. Charlton, __Wn. App. 2d__, 515 P.3d 537, 547 (2022). A defendant's waiver of the right to counsel and decision to proceed pro se

undoubtedly "pervades and contaminates the entire case." Id. As Justice Blackmun remarked in his dissent in Faretta v. California, "If there is any truth to the old proverb that 'one who is his own lawyer has a fool for a client,' the Court by its opinion today now bestows a constitutional right on one to make a fool of himself." 422 U.S. 806, 852, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Mr. Payne wanted to present evidence but did not know how to obtain it. 2RP 55, 69, 76-78. He did not cross-examine either complaining witness, mistakenly believing he would have another opportunity to cross-examine them after the prosecution rested. 2RP 250, 265, 296. He then expressed in closing his hope that he "presented enough evidence to prove [his] innocence," even though he presented no evidence at all. 2RP 335. There can be no question the constructive denial of counsel at Mr. Payne's Faretta colloquy pervaded and contaminated his entire case. This Court should therefore reverse Mr. Payne's convictions without examining prejudice.

Even if this Court concludes automatic reversal does not apply here, reversal is still required here under the constitutional harmless error standard. Charlton, 515 P.3d at 547. Constitutional error is presumed prejudicial. Anderson, 19 Wn. App. 2d at 564. The prosecution bears the burden of establishing the error was harmless beyond a reasonable doubt. Id.

In Anderson, the prosecution met its high burden of showing harmless error under the specific facts of the case.[3] Id. at 564. Anderson received all the forms of relief requested at his resentencing hearing. Id. There was no plausible basis for Anderson's attorney to ask to expand the scope of the hearing. Id. Attorney-client consultation therefore could not have made any difference. Id.

The record here is not as forgiving as in Anderson. While Mr. Payne expressed the desire to proceed to trial, he also indicated he wanted help from counsel. For instance, he stated he

[3] The Anderson court applied the constitutional harmless error standard because the parties there agreed that it applied. 19 Wn. App. 2d at 564 & n.2.

would love for Ms. Peyton "to help me in this case." 2RP 12. He likewise indicated, "I'm not saying that I don't want an attorney," just that "I've been here for nine months." 2RP 21. Mr. Payne did not appear to understand the rules of evidence and criminal procedure would apply to him at trial. 2RP 18-19. When informed of the maximum punishment for the charged offenses, he responded, "It doesn't matter." 2RP 17. He repeatedly expressed frustration at his two prior attorneys' withdrawals, rather than focusing on the questions at hand. 2RP 23-25.

There is simply no way the prosecution can show lack of prejudice beyond a reasonable doubt, given the significance of the hearing and the rights at stake. It is impossible to guess how the opportunity for private consultation might have affected Mr. Payne's understanding of the matter, as well as his ultimate decision to waive counsel and proceed to trial pro se. See State v. Irby, 170 Wn.2d 874, 886, 246 P.3d 796 (2011) (refusing to speculate on the prosecution's behalf where the defendant was denied his constitutional right to be present at all critical stages of

the litigation). Thus, even under the constitutional harmless error standard, reversal of Mr. Payne's convictions is necessary.

3. Mr. Payne did not make an unequivocal request to represent himself, and thereafter did not make a knowing, intelligent, and voluntary waiver of his right to counsel, necessitating reversal of his convictions.

The record does not reflect any unequivocal request by Mr. Payne to represent himself, as opposed to merely expressing his frustration at the delay and sudden withdrawal of his attorney. Nor does the record thereafter establish Mr. Payne's subjective understanding of the risks of self-representation, as well as the gravity of the charges against him. The trial court therefore erred in finding Mr. Payne validly waived his right to counsel and in allowing him to proceed pro se at trial. This Court should reverse Mr. Payne's convictions and remand for a new trial.

Individuals accused of a crime have "an explicit right to self-representation under the Washington Constitution and an implicit right under the Sixth Amendment to the United States Constitution." Madsen, 168 Wn.2d at 503. But "the right to self-

representation is in tension with another crucial constitutional right: a defendant's right to the assistance of counsel." State v. Curry, 191 Wn.2d 475, 482, 423 P.3d 179 (2018). Consequently, "the right to self-representation is neither self-executing nor absolute." Id.

There are two steps to allowing an accused person to proceed pro se. First, "[w]hen a defendant requests pro se status, the trial court must determine whether the request is unequivocal and timely." Madsen, 168 Wn.2d at 504. Second, "[a]bsent a finding that the request was equivocal or untimely, the court must then determine if the defendant's request is voluntary, knowing, and intelligent, usually by colloquy." Id. In making these determinations, the trial court must indulge every reasonable presumption *against* the defendant's waiver of counsel. State v. Burns, 193 Wn.2d 190, 202, 438 P.3d 1183 (2019).

A trial court's decision to grant or deny the accused's request to proceed pro se is reviewed for abuse of discretion. Curry, 191 Wn.2d at 483. "A trial judge afforded discretion is

not free to act at whim or in boundless fashion, and discretion does not allow the trial judge to make any decision he or she is inclined to make[.]" Id. at 484.

a. *In the context of the entire record, Mr. Payne did not make an unequivocal request to represent himself.*

To determine whether a request for self-representation was unequivocal, the court must answer two questions: "(1) Was a request made? If so, (2) was that request unequivocal?" Curry, 191 Wn.2d at 487. This determination must necessarily focus on the facts and circumstances of the case. Id.

On the first question, the court should consider how the request was made—"for example, was the request made formally in a motion or spontaneously at a hearing?" Id. at 488. The court should also consider the language used in the actual request—"for example, was the defendant asking to proceed pro se or expressing frustration?" Id. And, finally, the court should consider the context surrounding the request—"for example, was

the request made after counsel sought a continuance or because of a disagreement regarding strategy?" Id.

On the second question, the court "must also examine the nature of the request." Id. at 489. "Relevant considerations include whether the request was made as an alternative to other, preferable options and whether the defendant's subsequent actions indicate the request was unequivocal." Id. An unequivocal request to proceed pro se may be valid even if combined with an alternative request, like substitution of counsel, "but such a request 'may be an indication to the trial court, in light of the whole record, that the request is not unequivocal.'" Id. (quoting Stenson, 132 Wn.2d at 740-41).

The Washington Supreme Court in Curry held the defendant's request for self-representation was unequivocal. Id. at 495. There, Curry's newly appointed attorney needed a continuance to prepare for trial. Id. at 480. Curry was unwilling to accept the delay, so he asked his attorney to set a hearing to allow him to represent himself or, alternatively, to substitute

counsel. Id. Defense counsel filed a written motion on Curry's behalf, reiterating Curry's desire to represent himself "without any equivocation." Id. During the subsequent colloquy, Curry indicated he felt he had "'no choice'" but to proceed pro se, at one point stating, "'[i]t's not voluntary. It's I have no choice in the matter,'" because he did not want any further delay.[4] Id. at 481 (quoting VRP). Despite these statements, the supreme court recognized Curry "repeatedly expressed a desire to represent himself," including filing a written motion to proceed pro se. Id. at 494. The Curry court did not find Curry's request to be inadvertent, spontaneous, or merely an expression of frustration, even though frustration may have been the motivation. Id.

The Curry court distinguished these facts from State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001), and State v. Luvene, 127 Wn.2d 690, 903 P.2d 960 (1995), where the defendants' statements were not unequivocal requests for self-

[4] The court declined to decide whether the Curry's waiver of counsel was knowing, intelligent, and voluntary, because that issue was not raised on appeal. 191 Wn.2d at 486 n.3.

representation, "but merely an expression of frustration." Curry, 191 Wn.2d at 488-89. For instance, Woods objected to his attorney's request for a continuance, stating, "I will be—I will be prepared to proceed with—with this matter here without counsel come October 21st." Woods, 143 Wn.2d at 587. The trial court informed Woods that he had the right to do that, to which Woods responded, "Yes." Id. The supreme court held "telling a trial judge he 'will be prepared to proceed without counsel' is qualitatively different than telling a judge that one wishes to proceed pro se." Id. at 588. The former is merely an expression of frustration, not an expression of the unequivocal desire to represent oneself. Id.

The same was true in Luvene, where Luvene strenuously objected to his attorney's continuance request. 127 Wn.2d at 698. Luvene made conflicting statements like, "I don't wanna sit here any longer. It's me that has to deal with this. If I'm prepared to go for myself, then that's me," reiterating, "I'm prepared," but then immediately adding, "I'm not even prepared

for that." Id. The court concluded, taken in the context of the record as a whole, Luvene's comments were an "expression of frustration," rather than an unequivocal assertion of the right to self-representation. Id. at 699.

Like in Woods and Luvene, the record in Mr. Payne's case reflects his frustration with the last-minute withdrawal of his counsel, rather than an unequivocal desire to proceed pro se. Unlike in Curry, Mr. Payne never filed any written motion to represent himself, nor did he ever state that his request was unequivocal. It is not apparent from the record that any request at all was made, rather than a mere expression of frustration at the possibility of another continuance.

When Mr. Byrd withdrew as counsel four days before trial, Mr. Payne stated, "if he is withdrawing, I'm going to stick to my gun, and I'm ready to go Monday. No ands, ifs, or buts about it, with or without him." 1RP 128. But Mr. Payne immediately followed up, "I would prefer it to be with him." 1RP 129. Just like the frustrated defendants in Woods and Luvene, Mr. Payne

expressed displeasure about "sitting in jail," despite being "ready to go since day one." 1RP 129. When the court informed Mr. Payne he had a right to represent himself, Mr. Payne did not make an affirmative response. 1RP 129. The court set the matter over for a hearing the next day, indicating, "Mr. Payne is apparently making a request to represent himself." 1RP 132. Though Mr. Payne reiterated, "with or without him, I'm ready to go," he then asked Mr. Byrd if he was "willing to continue" and "ready to proceed or not?" 1RP 133. This reflected Mr. Payne's lack of understanding about what was occurring, not an unequivocal request to represent himself.

Then, at the hearing the following day, Mr. Payne still did not make any statement, unequivocal or otherwise, about his desire to proceed pro se. His newly appointed attorney explained, "Mr. Payne's main concern is getting this trial done, so he wants to go on Monday." 2RP 10. She continued, "I explained our options as standby counsel and he is more

interested on that." 2RP 10. She did not tell the court that Mr. Payne unequivocally wanted to represent himself. 2RP 10-11.

Then, when the court asked Mr. Payne how he wanted to proceed, Mr. Payne responded that he wanted counsel to collect evidence for him. 2RP 12. The court informed Mr. Payne that his attorney would need a continuance, to which Mr. Payne responded, "Well, I will -- if that's the case, I -- like I said, I will love her forward to [sic], you know, help me in this case." 2RP 12. Mr. Payne proceeded to discuss how the alleged victims told lies about him in discovery, concluding, "So I'm ready to go on Monday." 2RP 12-13. Although Mr. Payne repeated he was "ready to go on Monday" and was "not going to stand" for another delay, he emphasized, "I'm not saying that I don't want an attorney." 1RP 14-15, 21. Really, he explained, he was frustrated because "I've been here for nine months. I never -- I've never waived my 60-day speedy trial rights." 1RP 21. Near the end of the colloquy, Mr. Payne stated for the first time, "Yes, I

would like to present my case myself," but then immediately took issue with his attorney's withdrawal. 2RP 24.

This is not the kind of record that reflects an unequivocal desire to proceed pro se. And, indeed, the trial court never made any such finding. See 2RP 11-25. Although Mr. Payne once stated, "I would like to present my case myself," many more times he stated he wanted the help of counsel. 1RP 129; 2RP 12, 14, 21. And, while Mr. Payne repeatedly said he was "ready to go" to trial on Monday, he also indicated he still needed to collect evidence and did not understand the mechanism to present that evidence. 2RP 14, 18. As the Woods court recognized, Mr. Payne telling the court he was prepared to proceed without counsel was "qualitatively different" than telling the court he wanted to represent himself, particularly when there was no formal request—either oral or written—for self-representation. 143 Wn.2d at 588.

"[A]n unequivocal request to proceed pro se requires a defendant to 'make an explicit choice between exercising the

right to counsel and the right to self-representation so that a court may be reasonably certain that the defendant wishes to represent himself.'" Curry, 191 Wn.2d at 490 (quoting United States v. Arlt, 41 F.3d 516, 519 (9th Cir. 1994)). Mr. Payne repeatedly expressed his desire to have the help of counsel. He never made an explicit, unequivocal choice between counsel and self-representation, beyond voicing his frustrations about his prior attorney's last-minute withdrawal.[5] The record does not support the conclusion that Mr. Payne's request for self-representation was unequivocal.

b. *The court's colloquy with Mr. Payne does not demonstrate that he knowingly, intelligently, and voluntarily waived his right to counsel.*

Even if this Court concludes Mr. Payne's request for self-representation was unequivocal, the record does not allow the conclusion that his waiver of counsel was knowing, intelligent,

[5] Indeed, at a pretrial hearing on July 29, 2021, Mr. Payne said, "I will fire people and do it myself. I will defend myself. I don't care." 1RP 60. The court refused to interpret this as a request to proceed pro se: "I didn't hear that. I heard that he's frustrated with not getting to go to trial." 1RP 60.

and voluntary. "The fact that an accused may tell [the judge] that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility." City of Bellevue v. Acrey, 103 Wn.2d 203, 210, 691 P.2d 957 (1984). The court must also determine whether the accused understands the risks of self-representation, "keeping in mind the presumption against the waiver of the right to counsel." Burns, 193 Wn.2d at 204. The method for making this determination is a colloquy on the record, which "should generally include a discussion of the nature of the charges against the defendant, the maximum penalty, and the fact that the defendant will be subject to the technical and procedural rules of the court in the presentation of his case." Id. at 203. Courts should also consider inquiring into the defendant's "education, experience with the justice system, mental health, and competency." Id.

Significantly, however, "the question ultimately is the subjective understanding of the accused rather than the quality or content of the explanation provided." State v. Chavis, 31 Wn.

App. 784, 790, 644 P.2d 1202 (1982). A "mere routine inquiry" may leave the judge "entirely unaware of the facts essential to make an informed decision." Id. at 789. The judge must therefore make a "penetrating and comprehensive examination," id. at 790, for "'as long and as thoroughly as the circumstances of the case before him demand,'" id. at 789 (quoting Von Moltke v. Gillies, 332 U.S. 708, 723-24, 68 S. Ct. 316, 92 L. Ed. 309 (1948) (plurality opinion)). The record must establish the accused "'knows what he is doing and his choice is made with eyes open.'" Faretta, 422 U.S. at 835 (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 279, 63 S. Ct. 236, 87 L. Ed. 268 (1942)).

In Chavis, for instance, the defendant's single answer, affirmative responses to the judge's questions did not establish he fully understood the dangers and disadvantages of self-representation. 31 Wn. App. at 788-89. In Burns, the defendant stated, "I understand completely what you're talking about" and "I completely understand everything that I'm up against," but his

other remarks indicated the opposite. 193 Wn.2d at 204. For example, Burns stated the criminal charges did not pertain to him, he did not enter into a contract with the State, and the multiple felony charges did not faze him. Id. The judge's colloquy therefore demonstrated Burns did not understand the nature or seriousness of the charges against him, the importance of courtroom procedure, or the technicalities of self-representation. Id. at 204-05.

While the record here demonstrates the trial court asked the requisite questions, it does not reveal Mr. Payne's subjective understanding of the risks of self-representation. Mr. Payne explained he had never studied the law or represented himself in a criminal action. 2RP 16. When the court attempted to discuss the seriousness of the charges and the maximum sentence Mr. Payne faced, he responded, "It doesn't matter." 2RP 17. When asked if he understood he would be expected to comply with the rules of evidence and criminal procedure, Mr. Payne gave an answer the court characterized as "entirely wrong." 2RP 18. For

instance, Mr. Payne stated he knew a polygraph test was admissible and he could ask for it to be admitted in opening statement. 2RP 18. When the court tried to clarify the rules, Mr. Payne merely answered, "Okay," regarding the rules of evidence, and "[i]t's understood," regarding the rules of criminal procedure. 1RP 19-20. As for the question-and-answer format Mr. Payne would be subject to if he decided to testify, Mr. Payne said he would not oppose the prosecutor if he "wants to question me," indicating lack of understanding about his right to remain silent. 1RP 21.

Then, when asked why he wanted to represent himself, Mr. Payne responded, "I'm not saying that I don't want an attorney." 1RP 21. He proceeded to complain about conflicts with his first attorney and the sudden withdrawal of his second attorney. 1RP 21-22. He perseverated about the delay caused by both his attorneys and the prosecutor. 1RP 22-25. He went on to explain he is a musician and his music is available on multiple streaming platforms. 1RP 23-24. After stating his desire to proceed pro se

for the first time—"I would like to present my case myself"—Mr. Payne repeated his frustration with his attorney's last-minute withdrawal. 1RP 24-25. The trial court thereafter found Mr. Payne "knowingly voluntarily" waived his right to counsel. 1RP 26. Only after doing so did the court explain it was likely too late for Mr. Payne to obtain evidence in time for trial on Monday. 2RP 27-29.

At no time did Mr. Payne indicate he understood the gravity of the charges, the amount of prison time he faced if convicted, or the dangers of representing himself. Often his answers were either non-responsive or consisted of passive, one- or two-word responses. They did not reflect his subjective understanding of the significance of waiving counsel. Merely asking the requisite questions does not establish a knowing, intelligent, and voluntary waiver. State v. Chavis, 31 Wn. App. at 789-90. The trial court therefore erred in prematurely finding Mr. Payne waived his right to counsel without conducting a more

searching inquiry into whether Mr. Payne truly understood the risks of proceeding pro se.

Mr. Payne did not make an unequivocal request to proceed pro se and thereafter did not knowingly, intelligently, and voluntarily waive his right to counsel. The trial court abused its discretion in finding otherwise. When the accused is erroneously allowed to go pro se, the remedy is reversal and remand for a new trial. Acrey, 103 Wn.2d at 211-12. This Court should do so here.

4. **The sexual assault protection order related to B.A., who was not the victim of a sex offense, must be vacated, and the expiration date for both orders must be amended.**

a. *The trial court exceeded its statutory authority in entering a SAPO protecting B.A., who was not the victim of a sex offense.*

At sentencing, the prosecution requested the trial court enter "10-year sexual assault protection orders with both victims." 2RP 392-93. The prosecution acknowledged B.A. was not the victim of commercial sex abuse of a minor, but believed a

SAPO was appropriate because she was "a witness to that crime and a heavily involved witness." 2RP 393.

The court did not discuss the appropriateness of a SAPO related to B.A., but nevertheless entered SAPOs protecting both girls. 2RP 405-12; Supp. CP__ (Sub. Nos. 143 and 144). This was error, because the relevant statute permits entry of a SAPO only for the victim of a sexual offense, which fourth degree assault with sexual motivation is not. The court therefore had no statutory authority to enter a SAPO protecting B.A., who was not the victim of a sex offense.

"Sentencing is a legislative power, not a judicial power." State v. Soto, 177 Wn. App. 706, 713, 309 P.3d 596 (2013). "If the trial court exceeds its sentencing authority, its actions are void." Id. Statutory construction is a question of law reviewed de novo. Id. When interpreting a statute, this Court's fundamental objective is to ascertain and carry out the legislature's intent. State v. Gray, 174 Wn.2d 920, 926, 280 P.3d 1110 (2012). Statutory interpretation begins with the statute's

plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related provisions, and the statutory scheme as a whole. Id. at 926-27.

The trial court's authority to enter a sexual assault protection order following a criminal conviction is governed by RCW 9A.44.210.[6] It specifies:

> When a defendant is *found guilty of a sex offense as defined in RCW 9.94A.030*, any violation of RCW 9A.44.096, or any violation of RCW 9.68A.090, or any gross misdemeanor that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit an offense that is classified as a sex offense under RCW 9.94A.030, and a condition of the sentence restricts the defendant's ability to have contact with *the victim*, the condition shall be recorded as a sexual assault no-contact order.

[6] The SAPOs in Mr. Payne's case were "entered pursuant RCW 7.90." Supp. CP__ (Sub. Nos. 143 & 144). However, in 2021, the legislature overhauled former chapter 7.90 RCW, which governed both civil and criminal SAPOs. See Laws of 2021, ch. 215, § 1. Former RCW 7.90.150 (2006), relevant here, was recodified at RCW 9A.44.210, with only minor changes, including changing "protection order" to "no-contact order." Laws of 2021, ch. 215, §§ 164, 168. In Mr. Payne's case, "protection" orders were entered, so this brief largely refers to them as SAPOs.

RCW 9A.44.210(6)(a) (emphasis added). The plain language of this provision requires entry of a SAPO to protect victims of certain specified sex offenses. While the statute does not define "victim," reading that word in context clearly relates back to the qualifying sex offense. The legislature also chose to use the definite article "*the* victim" rather than the indefinite article "*a* victim," indicating the protected party must be the victim of the sex offense in question. In re Det. of Strand, 167 Wn.2d 180, 188-89, 217 P.3d 1159 (2009) (ascribing significance to this word choice).

Because no other statute authorizes entry of a SAPO following a criminal conviction, RCW 9A.44.210 provides the exclusive circumstances when a SAPO may be entered. Fourth degree assault with sexual motivation is not encompassed within any of the statutorily enumerated sex offenses. See RCW 9.94A.030(47) (defining sex offense); RCW 9A.36.041(2) (making fourth degree assault a gross misdemeanor); RCW 9.94A.835 (specifying sexual motivation special allegation

procedure). B.A. was therefore not the victim of a qualifying sex offense. RCW 9A.44.210 does not authorize entry of a SAPO for a witness who was not the victim of a sex offense. This interpretation comports with the purpose of the SAPO statute, which is to protect victims of sexual assault "for two years after the offender is no longer restrained." State v. Navarro, 188 Wn. App. 550, 555, 354 P.3d 22 (2015).

The trial court appropriately entered, as conditions of Mr. Payne's sentence, no-contact orders barring his contact with both B.K. and B.A. for 10 years, the statutory maximum for commercial sex abuse of a minor. CP 84-85; State v. Armendariz, 160 Wn.2d 106, 156 P.3d 201 (2007). Under Armendariz, no contact with B.A. was a reasonable crime-related prohibition, because she was a witness to the alleged commercial sex abuse of a minor and testified against Mr. Payne. 160 Wn.2d at 113. But the authorizing language in the SAPO statute is not so broad. It allows entry of a SAPO only to protect the victim of a sex offense, which B.A. was not. The trial court therefore

exceeded its statutory authority in entering the SAPO related to B.A. This Court should remand for that SAPO to be vacated. State v. Polk, 187 Wn. App. 380, 398, 348 P.3d 1255 (2015) (vacating no-contact order entered in excess of the trial court's statutory authority).

b. *The expiration dates for both SAPOs exceed the maximum allowable term.*

Even if the trial court properly entered a SAPO protecting B.A., the court nevertheless exceeded its statutory authority in setting 10-year expiration dates for both SAPOs. As discussed, such SAPOs are exclusively governed by RCW 9A.44.210. That statute mandates "[a] final sexual assault no-contact order entered in conjunction with a criminal prosecution shall remain in effect for a period of two years following the expiration of any sentence of imprisonment and subsequent period of community supervision, conditional release, probation, or parole." RCW 9A.44.210(6)(c).

The court of appeals in Navarro interpreted the plain language of this provision and concluded it has nothing to do with the generic statutory maximum for the underlying crime. 188 Wn. App. at 555. Rather, the expiration date of a SAPO must be specific to the offender. Id. at 555-56. This necessarily incorporates the offender's credit for time served, as well as his actual release date, which "is unknowable at the time of sentencing." Id. at 555. Therefore, the Navarro court held, "a sexual assault protection order should not provide a fixed expiration date." Id. at 555-56. "A preferable approach is simply to track the language of the statute by stating, for example, that the order 'shall remain in effect for a period of two years following the expiration' of the longest sentence served by the offender as a result of the prosecution." Id. at 556 (quoting former RCW 7.90.150(6)(c) (2006)).

The two SAPOs entered in Mr. Payne's case include this language, but also erroneously set a specific expiration date of January 20, 2032—10 years from entry of Mr. Payne's judgment

and sentence. Supp. CP__ (Sub. Nos. 143 and 144). As the Navarro court held, Mr. Payne's precise date of release from incarceration and subsequent community supervision is currently unknown. Mr. Payne was sentenced to 34 months in prison and 36 months of community custody, for a total of 70 months. CP 80-81. He is entitled to approximately 10 months of credit for time served in pretrial detention. CP 80; 1RP 4 (preliminary appearance on March 12, 2021); 2RP 378 (sentencing on January 20, 2022). Thus, even though the SAPOs will not expire for another two years after Mr. Payne's release date, that date will still be sooner than the current 10-year expiration.

This Court should remand for the trial court to strike the 10-year expiration date from both SAPOs and "adjust the language establishing the duration of the sexual assault protection orders." Navarro, 188 Wn. App. at 558.

5. **The trial court imposed multiple erroneous community custody conditions in Mr. Payne's felony and misdemeanor judgments and sentences.**

a. *The trial court erroneously ordered Mr. Payne to complete a mental health examination without finding Mr. Payne has a mental illness that influenced the offenses.*

As a condition of Mr. Payne's 36-month community custody term, the trial court ordered him to "undergo an evaluation for treatment" for "mental health." CP 82. In Appendix F of his felony judgement and sentence, the court likewise ordered Mr. Payne to "[c]omplete a mental health evaluation and comply with recommended treatment." CP 90.

A court cannot order an offender to participate in a mental health evaluation and treatment unless "the court finds that reasonable grounds exist to believe that the offender is a mentally ill person as defined in RCW 71.24.025, and that this condition is likely to have influenced the offense." RCW 9.94B.080. A court exceeds its statutory authority in ordering a mental health evaluation and treatment without making both of these requisite

findings. State v. Brooks, 142 Wn. App. 842, 176 P.3d 549 (2008).

Here, the trial court found neither that Mr. Payne is mentally ill as defined in RCW 71.24.025, nor that any mental illness likely influenced the offense. The court at sentencing simply did not address Mr. Payne's mental health at all. 2RP 405-13. And, in Mr. Payne's felony judgment and sentence, the court did not check the requisite box finding reasonable grounds to believe Mr. Payne is mentally ill and that any such condition likely influenced the offense. CP 78.

The trial court therefore failed to follow the proper procedures before ordering Mr. Payne to complete a mental health evaluation and any recommended treatment. Because a court may only impose a sentence authorized by statute, this Court should remand for the trial court to strike the mental health evaluation conditions from Mr. Payne's felony judgment and sentence. Brooks, 142 Wn. App. at 851-52.

b. *Mr. Payne's felony judgment and sentence erroneously includes discretionary supervision fees.*

At sentencing, the court found Mr. Payne indigent "for purposes of this appeal in this matter." 2RP 410. The felony judgment and sentence reflects the court's finding of indigency: "☒ The defendant is 'indigent' pursuant to RCW 10.101.010(3)(a)-(c)[.]" CP 79. The court indicated its intent to strike all discretionary LFOs. 2RP 410-12; CP 82-83. Despite the court's finding of indigency and intent to strike all discretionary LFOs, the felony judgment and sentence ordered, as a condition of community custody: "(7) pay supervision fees as determined by DOC [(Department of Corrections)]." CP 81.

The Washington Supreme Court recently held supervision fees are discretionary LFOs, waivable by the trial court. State v. Bowman, 198 Wn.2d 609, 629, 498 P.3d 478 (2021). The Bowman court concluded a trial court "commit[s] procedural error by imposing a discretionary fee where it had otherwise

agreed to waive such fees." Id. The court ordered supervision fees to be stricken from Bowman's judgment and sentence. Id.

Bowman compels the same result here.[7] The trial court intended to waive all discretionary LFOs. 2RP 410-12; CP 82-83. This Court should remand for the discretionary supervision fees to be stricken from Mr. Payne's judgment and sentence.

c. *Mr. Payne's misdemeanor judgment and sentence erroneously includes supervision fees and collection costs.*

Contrary to the court's express finding of indigency, the misdemeanor judgment and sentence found: "☑ The defendant is not 'indigent' as defined in RCW 10.101.010(3)(a)-(c) and therefore the court has considered the defendant's financial resources, and the nature of the burden that payment of costs will impose in determining the amount and method of payment for

[7] Division Three of this Court also just held the legislature's recent amendment to RCW 9.94A.703—removing supervision fees from the sentencing court's authority to impose—applies to cases still pending on appeal. State v. Wemhoff, __Wn. App. 2d__, __P.3d__, 2022 WL 16642347, at *2 (2022). For this additional reason, the supervision fees should be stricken from Mr. Payne's felony judgment and sentence.

costs imposed by this judgment." CP 96. Given that the court conducted no such inquiry into Mr. Payne's ability to pay, this finding appears to be a clerical error. Remand for correction of the clerical error is the appropriate remedy. In re Pers. Restraint of Mayer, 128 Wn. App. 694, 701-02, 117 P.3d 353 (2005).

The misdemeanor judgment and sentence thereafter ordered, as part of Mr. Payne's 12-month probation, "☒ The defendant shall pay a monthly community supervision fee to the Department of Corrections." CP 98, 100. As established in the section above, imposition of this fee was procedural error, where the court indicated its intent to waive discretionary LFOs. Bowman, 198 Wn.2d at 629.

The misdemeanor judgment and sentence further ordered: "☒ The defendant shall pay the costs of services to collect unpaid legal financial obligations. RCW 36.18.190." CP 98. RCW 36.18.190 gives the court discretionary authority to impose collection costs: "The superior court *may*, at sentencing or at any time within ten years, assess as court costs the moneys paid for

remuneration for services or charges paid to collection agencies or for collection services." (Emphasis added.) Because the court is not required to assess collection costs, they are discretionary LFOs. The reasoning and holding of Bowman therefore control on this issue, as well. State v. Ortega, 21 Wn. App. 2d 488, 499-500, 506 P.3d 1287 (2022) (applying holding of Bowman to collection costs).

This Court should remand for the trial court to correct the scrivener's error and strike both supervision fees and collection costs from Mr. Payne's misdemeanor judgment and sentence, where the record makes clear they were inadvertently imposed.

E. CONCLUSION

For the reasons discussed above, this Court should reverse Mr. Payne's convictions and remand for a new trial, at which Mr. Payne is provided counsel unless he knowingly, intelligently, and voluntarily waives that right. Alternatively, this Court should remand for the trial court to vacate the SAPO related to B.A., correct the fixed expiration dates for both SAPOs, and strike the

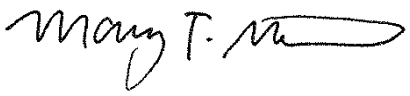
multiple erroneous community custody conditions from Mr. Payne's felony and misdemeanor judgments and sentences.

DATED this 14th day of November, 2022.

I certify this document contains 11,984 words, excluding those portions exempt under RAP 18.17.

Respectfully submitted,

NIELSEN KOCH & GRANNIS, PLLC



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